Gadsden Tool, Inc. *and* Retail, Wholesale and Department Store Union, AFL–CIO. Case 10–CA–30005–2

November 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On June 24, 1998, Administrative Law Judge Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.

1. Contrary to the dissent, we find that it is neither "analytically difficult" nor "counterintuitive" to find that the Respondent engaged in bad-faith surface bargaining even though the parties reached a complete collective-bargaining agreement on February 18, 1997. As explained by the judge, background evidence of statements made prior to the Union's certification as exclusive bargaining representative of the Respondent's employees strongly indicates that the Respondent entered negotiations with no intention of reaching agreement. Nevertheless, the credited evidence shows that on February 18, 1997, to the Respondent's surprise, the Union abandoned its position on several issues and accepted a comprehensive bargaining proposal that, according to the Respondent's attorney, the Respondent was itself never fully willing to approve. While the Respondent may have made the proposal with the mistaken expectation that the Union would never accept it, the Union had every right to treat the proposal as a valid offer. That is what the Union did, and at the point that the Union accepted the offer an agreement was made. The Respondent's refusal to sign that agreement violated Section 8(a)(5) of the Act.

Admittedly, if the Respondent had met its statutory obligation and signed the agreement reached on February 18, 1997, it would have had no further obligation to bargain about issues specifically covered by the agreement. That is not what happened. Instead, the Respondent made manifest its intent not only to refuse to sign the February 18 agreement *but also not to reach agreement on any terms.* In this regard, the Respondent's attorney told the Union's negotiator at the end of the February 18 bargaining session that "[y]ou realize that what you guys have done is shut this company down, because Mr. Hill is not going to sign a contract." The Respondent's attorney faxed to the Union a contract proposal, 10 days' later, that substantially altered the Respondent's prior wage proposal by establishing "absolute, uncontradictable management discretion" to determine wages.

Bargaining with a bad faith intent not to reach an agreement of any kind is as clearly violative of Section 8(a)(5) as a refusal to sign an agreement. The Respondent's course of conduct on and after February 18, 1997, constituted bad-faith surface bargaining. Contrary to the dissent, we find counterintuitive the notion that the unlawful act of refusing to sign a specific bargaining agreement insulates the Respondent from Board sanction for its subsequent unlawful attempt to avoid reaching any agreement. To remedy only the unlawful failure to sign would leave unremedied the Respondent's overall bad faith that infected the parties' bargaining. A violation must be separately found and remedied to discourage the repetition of such unlawful conduct in future contract negotiations.

2. The judge recommended that the Respondent be required to execute a contract that will extend for a period of 2 years and 9 months from the date of execution, consistent with the duration agreed to by the parties. We disagree. The record shows that the parties agreed at their February 18, 1997 negotiating session to a complete contract, giving the Respondent the right to define its term. The Respondent later supplied a termination date of November 24, 1999. The Board has no remedial authority to change the substantive terms of the parties' agreement by altering its effective dates. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). The recommended remedy will be modified to provide that the contract will run, not from the date of execution, but from the date of agreement on February 18, 1997, to the termination date of November 24, 1999.

We further note that the judge failed to provide any make-whole relief for the Respondent's failure to execute and implement the contract. Accordingly, we shall order the Respondent to execute the collective-bargaining agreement reached on February 18, 1997, to give retroactive effect to its terms and conditions of employment to February 18, 1997, and to make unit employees whole for any losses they may have suffered as a result of the Respondent's unlawful failure to execute the agreement. Backpay shall be computed in accord with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971); and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We shall further modify the judge's recommended Order in accord with our decisions in *Indian Hills Care*

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Center, 321 NLRB 144 (1996); and *Excel Container, Inc.,* 325 NLRB 17 (1997).

ORDER

The National Labor Relations Board orders that the Respondent, Gadsden Tool, Inc., Rainbow City, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to execute the collective-bargaining agreement that was reached on February 18, 1997.

(b) Refusing to bargain in good faith with the Retail, Wholesale and Department Store Union, AFL–CIO as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All production and maintenance employees employed by the Respondent at its Rainbow City, Alabama facilities, including machinists, welders, tool and die makers, carpenters and grinders; but excluding all office clerical employees, sales persons, professional employees, guards and supervisors as defined in the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Execute the collective-bargaining agreement reached by the parties on February 18, 1997; give retroactive effect to its terms and conditions of employment to February 18, 1997; and make employees whole, with interest, for any losses they may have suffered as a result of the Respondent's refusal to execute and abide by the agreement.

(b) On request, bargain in good faith with the Union as the exclusive collective-bargaining representative of unit employees.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days of service by the Region, post at its Rainbow City, Alabama, facilities copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 18, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER HURTGEN, dissenting in part.

I find it analytically difficult and counterintuitive to find that: (1) the Respondent bargained in bad faith, i.e., sought to avoid reaching an agreement; and (2) the Respondent reached an agreement. My colleagues seek to avoid this contradiction by suggesting that the Respondent intended *not* to reach an agreement, and was surprised when the Union accepted the Respondent's offer. However, the objective facts belie that intention. The objective and critical fact is that the Respondent tendered an offer, and thereby made itself vulnerable to acceptance and a contract. It would seem obvious that a party who wishes to avoid a contract would not make an offer which makes it vulnerable to acceptance and contract.

With respect to the Respondent's "surprise" when the Union accepted the offer, that fact (if true) does not support my colleagues' position. A party in bargaining may make a "low-ball" offer, and may be surprised when it is accepted. But, this does not mean that the party does not want an agreement. It simply means that the party did not expect the acceptance.

Concededly, the Respondent then sought to renege on the agreement reached. However, that violation is wholly remedied by the order that the Respondent sign and honor the agreement. Adding the further violation found by the majority adds nothing to the remedy, or to be remedied, here. More generally, we should not look for bad-faith "course-of-bargaining" violations where agreement is actually reached. Bargaining takes strange twists and turns occasionally and what may appear to be bad faith at one point becomes wholly remedied by further bargaining. Accordingly, I would not find a refusal to bargain in bad faith. I would simply find a refusal to sign and honor the agreement, and would order that the agreement be signed and honored.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[2] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to execute the collective-bargaining agreement that was reached on February 18, 1997.

WE WILL NOT refuse to bargain in good faith with the Retail, Wholesale and Department Store Union, AFL–CIO, as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All production and maintenance employees employed by us at our Rainbow City, Alabama facilities, including machinists, welders, tool and die makers, carpenters and grinders; but excluding all office clerical employees, sales persons, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL execute the collective-bargaining agreement that was reached on February 18, 1997, and WE WILL give retroactive effect to the terms and conditions of employment contained in the agreement to February 18, 1997.

WE WILL make our employees whole, with interest, for any losses they may have suffered as a result of our refusal to execute the agreement.

WE WILL, upon request, bargain in good faith with the Union as the exclusive collective-bargaining representative of our employees in the appropriate unit described above.

GADSDEN TOOL, INC.

John Doyle, Esq., for the General Counsel.
R. Kent Henslee, Esq. and *John H. Robertson, Esq.,* of Gadsden, Alabama, for the Respondent.
John Whitaker, of Gaston, Alabama, for the Union.

DECISION

PARGEN ROBERTSON, Administrative Law Judge. This hearing was held on April 13, 1998, in Birmingham, Alabama. The charge was filed on February 28, 1997, and amended on January 29, 1998. The complaint issued on January 30, 1998.

I. JURISDICTION

Respondent, is an Alabama corporation, with an office and place of business in Rainbow City, Alabama, where it is engaged in the operation of a tool and die shop. During the past year, it purchased and received at its Rainbow City facilities goods valued in excess of $50,000 directly from suppliers located outside Alabama. Respondent admitted that at all times material it has been an employer engaged in commerce as defined in the National Labor Relations Act (the Act).

II. LABOR ORGANIZATION

Respondent admitted that Retail, Wholesale & Department Store Union, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act.

III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

Respondent admitted that the following employees constitute a unit appropriate for collective-bargaining and that the Union was certified and has been the exclusive collective bargaining representative of those employees since October 23, 1995:

All production and maintenance employees employed by the Respondent at its Rainbow City, Alabama facilities, including machinists, welders, tool and die makers, carpenters and grinders; but excluding all office clerical employees, sales persons, professional employees, guards and supervisors as defined in the Act.

Former employee Ladon Wells recalled that Respondent president Lillon Hill talked to the employees during the union campaign. Hill held up a blank sheet of paper and said that was what they would get if the Union tries to come in.

Lillon Hill admitted holding the meeting recalled by Wells and he admitted that he held up a blank sheet of paper. He denied telling the employees that if they got the Union in this is all they would get. Instead, he testified, that he told the employees that a blank sheet was where negotiations started.

Union Staff Representative John Whitaker testified that he met with Respondent President Lillon Hill before the Union was certified in 1995. Hill told Whitaker that he had a lot of other businesses, that he dealt in real estate and that money wasn't the issue but "that Gadsden Tool wasn't going to be Union."

Lillon Hill admitted meeting with John Whitaker. He denied telling Whitaker that Respondent would shut their plant down rather than have a Union. Hill did not testify as to whether or not, he told Whitaker that Respondent was not going to be Union.

The General Counsel alleged that Respondent has failed and refused to sign a written agreement and has engaged in surface bargaining since November 1995.

The Union presented Respondent with a complete collective-bargaining contract proposal at a November 1995 negotiating session (G.C. Exh. 6). The parties next met to negotiate in January 1996. Respondent submitted a complete contract proposal to the Union during that meeting (G.C. Exh. 7). In a February 1996 meeting the Union made a second complete contract proposal (G.C. Exh. 8). On February 28, 1996, Respondent faxed to the Union a change in its proposal regarding grievance procedure (G.C. Exh. 10). When the parties met in April 1996, the Union made another complete contract proposal (G.C. Exh. 11). Respondent submitted a status report during that same

meeting (G.C. Exh. 12). The status report referred to provisions in Respondent's original collective bargaining contract proposal.

Respondent made another collective-bargaining contract proposal when the parties met to negotiate on June 4, 1996 (G.C. Exh. 13). The Union responded to Respondent's proposal by fax on June 17, 1996 (G.C. Exh. 14).

In August, the parties met along with a Federal mediator. The parties next met on November 11, 1996. Respondent presented the Union with a negotiations status report (G.C. Exh. 16). On December 2, the parties agreed to settle unfair labor practice allegations in Case 10–CA–29121.

The next negotiation session was on January 10, 1997. Respondent wrote the Union on January 13 and outlined agreements made during the January 10 meeting (G.C. Exh. 20). Respondent also submitted another status report to the Union on January 13 (G.C. Exh. 22). That report and all status reports submitted by Respondent referred to Respondent's original contract proposal (G.C. Exh. 7).

James Sisson, John Whitaker, and former employee Ladon Wells with the Union, and Jimmy Hill and Kent Henslee with Respondent, testified about a February 18, 1997 negotiation session. Sisson was the chief union spokesman at that session. General Counsel's Exhibit 23 was prepared by Respondent and submitted as a collective-bargaining proposal. During negotiations that day the Union brought up that the parties had also agreed to provisions regarding Saturday work, in settlement of unfair labor practice charges. Respondent's attorney agreed that those provisions had been inadvertently left out of the document received as General Counsel's Exhibit 23. The parties agreed to some additional minor changes to General Counsel's Exhibit 23. Then the Union proposed that Respondent retain the employees' Blue Cross health insurance plan and pay the full cost. Respondent rejected that proposal and proposed they would continue to pay one-half the premiums and maintain the current level of benefits but would reserve the right to change their insurance carrier. The Union agreed to that proposal. Respondent had previously proposed that it have the right to layoff employees for up to 30 days without regard to seniority. The Union proposed limiting the number of layoff days to 15. Respondent rejected that proposal and the Union agreed to Respondent's 30-day layoff proposal.

The parties returned to negotiations after lunch and Respondent's attorney, Kent Henslee, excused himself because of another engagement. Both during and before the February 18 session, Respondent had proposed retention its current wage rate system (see G.C. Exhs. 7 and 23). After Attorney Henslee left the February 18 meeting the union negotiators asked Respondent Vice President Jimmy Hill to explain Respondent's current wage system. Hill explained that they may hire an unskilled employee at $5.50 an hour and he would receive 15-cent-an-hour increases until he reached $7.50 per hour. After reaching $7.50 the employee would be evaluated every 3 months and receipt of a wage increase would depend of the skills he had acquired, jobs he had learned, attendance, dependability, and loyalty to the Company. After receiving that explanation the Union made proposals on health insurance, a drug card, a cafeteria plan, a holiday after Thanksgiving, and vacations. Respondent rejected all those proposals and Jimmy Hill commented that Respondent would have instituted a cafeteria plan several years earlier had it not been for the Union.

Ladon Wells testified that he did receive pay raises after Respondent hired him in February 1992 until he reached $7.50 per hour. Thereafter he received some pay increases after evaluations.

James Sisson testified that when Respondent's attorney, Henslee, returned to the February 18 meeting, union spokesman, Sisson, reviewed the things the Union had discussed with Jimmy Hill. Sisson told Respondent that the Union accepted Respondent's original contract proposal along with the agreed to changes (G.C. Exh. 23) provided Respondent agree to a 50-cent across-the-board pay increase. Respondent's attorney leaned back and said, "That's interesting. We need to caucus." Respondent returned from their caucus and said they would not give the 50-cent increase across the board. The Union then said they agreed to accept Respondent's proposal (G.C. Exh. 23) with the changes agreed to early on February 18 and the current wage rate system as explained by Jimmy Hill. Respondent's attorney said that he would clarify what Jimmy Hill had said and send it to the Union by fax. The Union said it was not opposed to 1, 2, or 3 years' duration on the contract and Respondent could elect which it wanted.

Vice President Jimmy Hill's testimony was in substantial agreement with the testimony of James Sisson. Hill testified that Respondent's attorney did excuse himself from the meeting for a time after lunch. Hill recalled that the Union did ask that the employees be given drug cards, life insurance and another holiday. Hill testified that he explained to the Union how Respondent would pay a newly employed person with no experience.

Jimmy Hill admitted on cross-examination that James Sisson did ask him to explain Respondent's wage system during the February 18 negotiation session. He admitted that he explained to the Union that the lowest pay rate offered to new employees is generally at least $6 an hour and that generally employees are granted pay increases of at least 15 cents an hour each quarter until they reach $7.50 an hour. Some employees are hired in at higher pay than $7.50 an hour. Employees are evaluated if they are paid at or above $7.50 an hour on the basis of "attendance, tardiness, their skill level, how they're progressing, if they're, I'd say, willing to work with us on schedules."

Hill testified that Sisson recapped for Respondent's attorney, Henslee, what had been discussed during the attorney's absence from the meeting. Hill admitted that the Union made an offer, which included a 50-cent-across-the-board pay increase, and that Respondent rejected the Union's offer after caucusing. Jimmy Hill testified that the Union said they would accept what Respondent was "doing with wages now, everything that's agreed to in the contract (the Union) accept. . . . Everything that was agreed to, everything that was not agreed to they would accept our proposal." Hill admitted that he was surprised at the Union's acceptance but he denied saying, "[O]h, my God."

Respondent Attorney Kent Henslee testified in agreement with others at the February 18 negotiation session, that he left that meeting for a time after lunch. At the time he left the meeting the parties had not negotiated wages during that or during earlier bargaining sessions. He testified that he "did not want anyone but me to negotiate on behalf of the Union or the Company, and to negotiate language or Company procedure. That was the understanding I thought that we all had when I left for those few minutes."

Henslee agreed that the Union eventually said, "[W]hatever Jimmy Hill said is what we'll agree to."

Sisson and Whitaker testified about talking with Respondent's attorney at the end of the February 18 meeting. Sisson testified that after everyone but Respondent's attorney, Whitaker, and Sisson left the room, the attorney said to Whitaker and Sisson:

> You know, this is very interesting. I don't think I've ever seen this happen before. I said, what is that, that the Union would agree totally to the Employer's proposal? He said, well, that's a very—that's a—you took a big risk, but I have a feeling that was a very calculated risk. I said, certainly, we didn't take it without calculation. He made the statement to Johnny (Whitaker) and I, well, - something to the effect that, well, you realize you're going to close this company down. . . .You realize that what you guys have done is shut this company down, because Mr. Hill is not going to sign a contract. . . . you don't understand, these people are entrepreneurs, they can start another business, they could go to manufacturing other things. So, I said, well, you know, you can relay for me that that's not going to stop us from making a contract.

Henslee admitted talking to Sisson and Whitaker at the close of the February 18 meeting. He said to Sisson and Whitaker, "I don't believe you're willing to do this to the employees." Henslee denied that he told anyone that a client of his is willing to violate the law.

Respondent faxed the Union a February 28, 1997 letter. In that letter Respondent's attorney stated among other things:

> As you will remember, I expressed a fear that there was not a complete meeting of the minds in the last offer made by the Union. In the words of Mr. Sisson, "nothing relating to wages will change". I do not believe that the Union intends to leave absolute discretion to management for the setting of wages, wage increases or reductions, or other matters relating to the paying of employees. However that was the agreement expressed to management by the Union at our last negotiations session.
>
> If I am clear in my understanding of your proposal, that the decision of what to pay an employee, when to pay an employee, when or if an employee should be given an increase or decrease, and all other matters relating to compensation not specifically prohibited by the contract will be left to the absolute and unequivocal discretion of management. If there are any reservations in your mind then those reservations should be voiced now, articulated to the point that we can address them, and negotiated to the extent that they become resolved.
>
> As we left our meeting last week, I indicated to you and Mr. Sisson that I would try to draft some language to put into contract form the current wage practice of the employer. I have attempted to do so. However, you will note that the language is not in the norm because I have no past experience to guide me. I have never had a union come into negotiations on an initial contract and be willing to accept the absolute, uncontradictable management discretion that was exercised by management before the Union became the certified bargaining agent of the employees. However I have attempted to do what you asked.
>
> You will note that the enclosed language gives to management absolute, unequivocal, unchallenged and nonrecourse discretion. That is exactly what management had exercised when we came to the table. If you are sincere in your offer you have abdicated to management any voice in wages paid to our employees. So be it. The attached language binds you to that agreement.

On cross-examination Henslee testified that he did not know whether Respondent would have agreed to a Union proposal to accept the Respondent's offer (G.C. Exh. 7). He testified that the offer was merely presented as a starting point for negotiations. That entire proposed contract was not agreeable to Respondent even though Respondent made the proposal.

The parties did not meet in negotiations after February 28. On January 14, 1998, the Union wrote Respondent and included a document described as the wage proposal that was agreed to and discussed at the negotiation on February 18, 1997. That document follows:

"WAGES"

MAINTAIN THE CURRENT WAGE SYSTEM

The current wage system is defined as:

The starting rate for all new employees will be a minimum of $5.15 per hour* and will receive an increase of $.15 per hour every three months until they reach $7.50 per hour.

After an employee reaches $7.50 per hour, the company will evaluate them every three months. Hourly wage increases during this evaluation will be based on what jobs the employee is doing and the "Market Value" of these jobs (Market Value is defined as what this and other companies pay employees to do the same type job) attendance, dependability, productivity, efficiency and how they get along with others and loyalty to the company.

*The minimum wage to reflect the current Federal Wage Rate.

Respondent's attorney wrote the Union on January 20, 1998, stating that he would respond to their January 14 letter as early the following week as possible. There was no further contact between the parties.

Findings

Credibility

I was impressed with the demeanor of former employee Ladon Wells and I credit his testimony regarding a meeting held by Respondent's president during the union organizing campaign and regarding a negotiation session on February 18. John Whitaker also testified about that negotiation session. I found Whitaker demonstrated good demeanor and I credit his testimony regarding a meeting he had with Respondent's president before the Union was certified. As to the February 18 negotiation session, I found that James Sisson demonstrated good demeanor and a better recollection of the events than Wells, Whitaker, Kent Henslee, or Jimmy Hill. To the extent there are conflicts between what Hill, Henslee, Whitaker, Wells, and Sisson recalled of that meeting, I credit Sisson.

One key credibility issue revolved around what occurred during the February 18, 1997 negotiation session while Respondent's attorney was absent. Three of the four people present at that time testified. As shown above, I was impressed with the demeanor and the recollection of James Sisson. His testimony did not materially differ from anything recalled by John Whitaker or Ladon Wells. Moreover, the testimony of Jimmy Hill illustrated that Sisson's testimony was correct.

Another key credibility issue involved the conversation at the close of the February 18 meeting between Sisson, Whitaker, and Respondent's attorney. In view of my findings as shown above and John Whitaker's corroboration of Sisson's account of that conversation, I credit James Sisson's testimony. I was not persuaded that Kent Henslee was truthful in his testimony that he only expressed concern that the Union may not be properly representing the unit employees. I am also concerned about Henslee's testimony that the parties had an understanding when he left the February 18 meeting that no one but Henslee, would negotiate on behalf of the Company. The undisputed testimony of all others at that negotiation session, showed that the parties continued to negotiate after Henslee left the meeting. The Union made numerous offers and Vice President Jimmy Hill rejected each of those offers. Hill also explained the Respondent's current wage rate system on request from the Union. That evidence and the fact that Henslee's testimony was not supported by credited evidence illustrated that there was no agreement between Respondent and the Union that no one would negotiate on behalf of the Company while Henslee was absent.

Conclusions

> "In determining the existence of bad faith bargaining [the Court examines] 'the employer's conduct in the totality of the circumstances in which the bargaining took place.' [Citations omitted.] Moreover, [the Court has] noted that 'the Board not only looks to the employer's behavior at the bargaining table but also to its conduct away from the table that may affect the negotiations.' Id. [The Court has] recognized that 'the question of good faith bargaining is for the Board's expertise more than ours.' [Citations omitted.] Consequently, [the Court] will affirm a finding by the Board of an employer's bad faith bargaining if it is supported by substantial evidence on the record as a whole.
>
> The Board based its finding that [the employer] failed to bargain in good faith upon [the employer] engaging in unfair labor practices 'away from the table,' and surface bargaining during the sessions . . .. " [*Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1376 (1993).]

Respondent filed a motion to strike a section of counsel for the General Counsel's brief, as alleging matters not included in the complaint. To the extent Respondent shows that it was neither alleged nor fully litigated that Respondent, through its vice-president, dealt directly with bargaining unit employees concerning their wages, I agree. I find that direct dealing was not fully litigated and I find that the record does not support the General Counsel's argument that direct dealing should be considered as a criteria for determining that Respondent engaged in bad-faith bargaining.

However, the credited evidence did include several factors that I have considered in determining whether Respondent engaged in bad-faith bargaining. As shown above I credited the testimony of Ladon Wells that Respondent's president showed the employees a blank sheet of paper and told them that is what they would get if the Union tries to come in. I also credited the testimony of John Whitaker that Respondent's president told him that Respondent wasn't going to be Union.

When the parties met in collective-bargaining negotiations in November 1995 the Union submitted a written collective-bargaining proposal (G.C. Exh. 6). Respondent submitted a complete contract proposal (G.C. Exh. 7) at the January 1996 negotiation session. That proposal included a preamble; a recognition provision; a nondiscriminatory policy; management rights; union security; hours of work; overtime; seniority; holidays; vacations; discipline, suspensions and discharges; grievance procedure and arbitration; no-strikes, no lockout; leaves of absence; worker's compensation; health insurance; wages; health, safety and welfare; miscellaneous; duration, and effective date. Only the preamble, duration and effective date provisions included blanks for later inclusion of the effective date and duration. In all other regards the Respondent's proposal was complete. As shown herein, there was a dispute as to whether the parties agreed to provisions on wages. That section of the Respondent's January 1996 proposal was as follows:

ARTICLE XVIII—WAGES

> Section 1.The wage scale attached hereto and marked Exhibit "A" shall be and become a part of the agreement.
>
> Section 2.All employees shall receive their weekly earnings, which will be based on the previous week's work, on Friday at the close of the workday.

Exhibit A read as follows:

WAGE SCALE

> The Company agrees to continue in effect the current rate system pertaining to production rates and hourly rates of employees during the term of this agreement.

Respondent submitted another complete contract proposal on February 18, 1997 (G.C. Exh. 23). That proposal included a preamble; a recognition provision; a nondiscriminatory policy; management rights; union security; collective-bargaining procedure; notice to the Union; hours of work; overtime; seniority; holidays; vacations; discipline, suspensions and discharges; grievance procedure and arbitration; no-strikes, no lockout; leaves of absence; worker's compensation; wages; health, safety and welfare; miscellaneous; duration, and effective date. Only the preamble, duration and effective date provisions included blanks for subsequent insertion of the effective date and duration. That wages article of the Respondent's February 1997 proposal was almost identical to the one in its January 1996 offer. The February 18 provision was:

ARTICLE XVIII—WAGES

> Section 1.The wage scale attached hereto and marked Exhibit "A" shall be and become a part of the agreement.

Exhibit A was as follows:

WAGE SCALE

> The Company agrees to continue in effect the current rate system pertaining to production rates and hourly rates of employees during the term of this agreement.

The parties agreed on February 18 that some matters were inadvertently omitted from General Counsel's Exhibit 23. Respondent agreed to include their agreement in an unfair labor practice case settlement, regarding Saturday work. During the February 18 negotiations the Union asked Respondent's vice president to explain Respondent's current rate system. As shown above he explained that employees may be hired at rates below $7.50 an hour. If so those employees received 15-cent raises each quarter until the particular employee reached a rate of $7.50. All employees at or over $7.50 an hour were subject

to quarterly evaluations. Those evaluations determined whether the particular employee received a raise that quarter. Vice President Jimmy Hill admitted that he told the Union that evaluations were based on "attendance, tardiness, their skill level, how they're progressing, if they're, I'd say, willing to work with us on schedules."

After making some offers that were rejected by Respondent, the Union accepted Respondent's latest contract proposal (G.C. Exh. 23) as amended at the February 18 meeting and in keeping with the wage scale explanation by Respondent's vice president.

Subsequently, Respondent's attorney submitted a different proposal (G.C. Exh. 25). He wrote that the Union had agreed to permit Respondent to unilaterally change its wage system to increase or decrease pay without negotiations and without recourse through the grievance procedure.

Instead of the wage proposal included in both General Counsel's Exhibit 7 and General Counsel's Exhibit 23 (above), Respondent included the following wage provision in its February 28, 1997 letter:

WAGES

Section One: Present employees. The wage rates of all present employees will be established at the current rate received by the employee at the commencement of this agreement.

Section Two: New Hires. New hires will be paid a wage rate established by management at the time the employee is hired.

Section Three: Wage increases or decreases may be made periodically during the term of this agreement when, in the absolute discretion of management, it is determined to be in the best interest of the company. The decision to give a wage increase or decrease or the decision to refrain from giving a wage increase or decrease shall not be subject to review or to the grievance procedure.

Section Four: The establishment of rates of pay and changes therein are reserved to the absolute discretion of management. Under any grievance permitted under this Article the burden of proof shall be cast on the Union to a reasonable satisfaction that the actions of management was beyond the broad discretion intended in this article. Provided, however, that the language of this Section Five is not intended to permit reviews or grievances prohibited by Section Three.

I find that Respondent's action was illustrative of bad-faith negotiations. On February 18 the Union accepted Respondent's last contract offer (G.C. Exh. 23). That offer included a provision that Respondent would continue in effect the current wage rate system. There was nothing in that offer to the effect that Respondent had absolute discretion as to "what to pay an employee, when to pay an employee, when or if an employee should be given an increase or decrease, and all other matters relating to compensation." (See Respondent's February 28 letter (G.C. Exh. 25).) Respondent's contract proposal, which was accepted by the Union, clearly established that Respondent would continue in effect its current rate system. Moreover, the credited evidence also showed that Respondent, through Jimmy Hill, had explained during negotiations that Respondent would not decrease any employees' wages.

Some of the key factors showing bad faith include the comments by Respondent's president to its employees during the Union's organizing efforts; his comments to John Whitaker before the Union was certified; Respondent's February 28, 1997 withdrawal of its collective-bargaining contract offer after the Union had accepted that offer on February 18 (*Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781 (1996*); Atlanta Hilton & Tower,* 271 NLRB 1600 (1984); and *Driftwood Convalescent Hospital,* 312 NLRB 247 (1993)); the comments by Respondent's attorney that Respondent would not sign a contract; its attorney's admission at the hearing that Respondent was never fully agreeable to its own collective-bargaining proposals and Respondent's February 28 contention that the Union had agreed to more onerous collective-bargaining proposal regarding wages.

Respondent argued in its brief that the parties had not negotiated wage rates. However, it is undisputed that Respondent submitted a complete collective-bargaining proposal in January 1996. That proposal contained a wage rate provision. Respondent continued to propose essentially the same wage provision throughout negotiations. The February 18, 1997 proposal by Respondent included as Exhibit A, a wage rate proposal that was identical to the one proposed in January 1996. During February 18, 1997 negotiations the parties agreed to some changes to General Counsel's Exhibit 23. They agreed to a correction of Respondent's address and to the inclusion of the parties' agreement regarding Saturday work in settlement of unfair labor practices. The Union accepted that contract proposal by Respondent and informed Respondent it would agree to a duration of 1, 2, or 3 years. Respondent's elected to make the contract effective on the day of ratification and to extend through November 24, 1999.

Respondent argued that it included a wage provision in its January 1996 and February 1997 proposals only to remind the parties that they were agreeing to negotiate the economic factors at the end of negotiations. Respondent cited as the only evidence supporting its contention that Exhibit A was included only as a reminder, Kent Henslee's testimony at transcript pages 162 and 163. There Henslee testified that he included Exhibit A in the January 1996 and February 1997 as a reminder. Henslee then testified that "was discussed with the Union at the time this agreement was distributed to them on the second negotiation session (January 1996)."

In view of the full record, I find there was no agreement to delay a wages agreement beyond February 18, 1997. As shown above, I credit the testimony of John Whitaker. Whitaker testified as to the parties' discussion after Respondent distributed General Counsel's Exhibit 7 to the Union during the January 1996 meeting. The Union questioned Henslee about General Counsel's Exhibit 7 including Respondent's Exhibit A to Exhibit 7. Henslee was asked about the meaning of "current rate system". "Mr. Lillon Hill responded and said that it was an evaluation system." As shown above, when the Respondent again presented a contract proposal containing Respondent's Exhibit A on February 18, 1997, Vice President Jimmy Hill was asked to explain Respondent's "current rate system." Hill explained the wage system to the Union. When Attorney Henslee returned to the meeting, he was told that Hill had explained the wage rate system. Henslee asked Hill if the Union's explanation was correct and Hill agreed that the Union's explanation of what he had said about the wage rate system, was correct. Henslee said nothing during the February 18 negotia-

tions, about any agreement to delay discussions about wages. Henslee did not correct Jimmy Hill's explanation of "current wage rate system" and he did not say anything to the effect that Respondent's Exhibit A in the February 18 contract proposal, was only a reminder to discuss wages in the future.

Respondent also argued that Jimmy Hill did not understand that the Union was asking him on February 18 for full details about all the parameters concerning the wage rate payment that the company had in place. That argument misses the point at issue. On February 18 Respondent, not the Union, proposed a collective-bargaining agreement that included a provision regarding wages. Regardless of what Jimmy Hill understood of the February 18 negotiation session, the Union stated that it was satisfied with his explanation of Respondent's wage proposal. It was after that explanation that the Union accepted Respondent's offer as written in General Counsel's Exhibit 23.

Respondent argued that its wage system was not fully described in any proposal made by either party. That may be so. However, there is nothing in the law that requires such a description and, as shown above, the Union was satisfied with Respondent's written proposal as explained by Jimmy Hill on February 18. I am convinced that the parties had a meeting of the minds on February 18, 1997. Respondent, as the party that drafted the written agreement (G.C. Exh. 23), is in poor position to now complain that its proposal failed to include an adequate description of its wage rate system.

Specifically, the record shows that the Union agreed to Respondent's February 18 proposed written contract (G.C. Exh. 23) as amended by agreement of the parties during the February 18 negotiations. Those amendments included a change in Respondent's address and the inclusion of the parties' settlement agreement in Case 10–CA–29121, regarding Saturday work. The Union advised Respondent on February 18, that it was agreeable to a duration set by Respondent. Subsequently, on February 28, 1997, Respondent notified the Union that the contract would be effective through November 24, 1999. However, Respondent has refused to execute that agreement since February 28, 1997, in violation of Section 8(a)(1) and (5) of the Act.

Until the Union accepted Respondent's offer on February 18, Respondent had never proposed that it be given absolute discretion in the establishment and maintenance of wage rates. Its written proposal on February 28, 1997, was substantially different from its February 18 proposal that was accepted by the Union and unlike anything Respondent had proposed before that time.

Respondent's actions made a collective-bargaining contract impossible. It is clear from the record evidence that the Union could have done nothing which would have resulted in an agreement. I find that Respondent engaged in unlawful conduct in violation of Sections 8(a)(1) and (5) of the Act.

Finally, Respondent argued that to "the extent that the Union charges Respondent with unfair labor practices occurring more than 6 months before the filing of its charge the Respondent raises a Section 10(b) defense of statute of limitations." As shown above, I find that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act. My findings are that those unfair labor practices occurred on and after February 18, 1997. Specifically, Respondent has refused to sign a written collective-bargaining agreement since that date and Respondent engaged in bad faith surface bargaining from February 18, 1997. The Union filed the unfair labor charges on February 28, 1997. Therefore, I find that no unfair labor practices were alleged or shown to occur more than 6 months before the charge was filed. Respondent's 10(b) defense is without merit.

CONCLUSIONS OF LAW

1. Gadsden Tool, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act?

2. Retail, Wholesale & Department Store Union, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent, by engaging in bad-faith negotiations with the Union as exclusive collective-bargaining representative of its below described employees, and by refusing to sign an agreed to collective-bargaining agreement, has engaged in conduct in violation of Section 8(a)(1) and (5) of the Act:

> All production and maintenance employees employed by the Respondent at its Rainbow City, Alabama facilities, including machinists, welders, tool and die makers, carpenters and grinders; but excluding all office clerical employees, sales persons, professional employees, guards and supervisors as defined in the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6), (7), and (8) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I recommend that it be ordered to cease and desist therefore and to take certain affirmative action designed to effectuate the policies of the Act.

As I have found that Respondent has engaged in surface bargaining and refusal to sign an ageed to collective-bargaining agreement after acceptance by the Union, Respondent is ordered to restore conditions to status quo ante as of the end of the negotiations on February 18, 1997, and upon request, to sign the agreed to collective-bargaining agreement and to bargain in good faith with the Union.

[Recommended Order omitted from publication.]